

No. 78-1265

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

MIGUEL NAZRENO VILLANUEVA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT
IN OPPOSITION

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A11) and the decision of the Board of Immigration Appeals (Pet. App. A1-A7) are not reported.

JURISDICTION

The order of the court of appeals was entered on November 17, 1978. The petition for a writ of certiorari was filed on February 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner is eligible for withholding of deportation under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h).

STATUTE INVOLVED

Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), provides:

The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

STATEMENT

Petitioner is a native and citizen of the Philippines. On December 13, 1969, he entered the United States as a nonimmigrant in transit without a visa, authorized to remain until December 22, 1969. On February 3, 1971, he was found deportable as an alien who had remained in the United States without authority. He was given until February 13, 1971, to depart voluntarily (A.R. 2-3, 55).¹

Petitioner's departure was subsequently deferred at the request of the United States Attorney's office for the Southern District of New York, in order to allow him to assist in the investigation and trial of a number of co-conspirators in an international narcotics smuggling operation (A.R. 3).² Petitioner's operation led

¹"A.R." refers to the administrative record filed in the court of appeals.

²Petitioner was arrested in Seattle, Washington, during the investigation of a narcotics smuggling ring based in the Philippines. At the time of his arrest, he was carrying a substantial quantity of heroin in a specially-made body pack. Petitioner was one of dozens of couriers who had brought drugs into the United States in this manner. Upon his arrest petitioner agreed to cooperate with the government (A.R. 53). He pleaded guilty, on May 12, 1971, to a charge of possession of narcotics from a package not bearing a tax stamp and received a two-year suspended sentence (A.R. 34, 51).

directly to the arrest, trial, and conviction of six American nationals in two separate cases. Petitioner testified at both trials. In addition, petitioner's grand jury testimony led to the indictment of a number of Philippine nationals who were the principals in the smuggling ring. However, because the United States does not have an extradition treaty with the Philippines, those defendants remained in the Philippines and could not be brought to justice (A.R. 53).³

On June 25, 1975, petitioner requested political asylum in the United States (A.R. 66 *et seq.*). He claimed that if he was returned to the Philippines the principals in the smuggling ring would seek to harm him. The District Director of INS referred the matter to the Department of State in accordance with 8 C.F.R. 108.2 (1978) (A.R. 72). The Department of State recommended that petitioner not be granted asylum because his request was based on factors not related to persecution for reasons of race, religion, nationality, political opinion, or membership in a particular social group (A.R. 70-71). The Department conceded, however, that petitioner's fear of underworld retribution was "probably a valid [one]" (A.R. 71). The District Director thereafter denied petitioner's request for political asylum on February 7, 1977 (A.R. 3).

Meanwhile, petitioner had moved to reopen his deportation hearing in order to apply for essentially the same relief under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h) (A.R. 3). The reopened hearing, which was postponed pending the District Director's decision, was conducted on February 14 and February 22, 1977 (*ibid.*). At the hearing, petitioner presented substantial evidence,

³One Filipino conspirator was arrested in Hong Kong, extradited to the United States, tried and convicted. Petitioner also testified at his trial (A.R. 53).

including affidavits from Charles B. Updike, the former Assistant United States Attorney in charge of the Philippine drug smuggling case (A.R. 35-37, 42-46, 52-53), in support of his claim that his life would be in jeopardy if he was returned to the Philippines. There was also evidence that the ringleader of the conspiracy was a lawyer who was formerly a vice-governor of Lucena Province in the Philippines (A.R. 35, 53). In the opinion of Mr. Updike, the former Assistant United States Attorney, it was probable that this man was still politically influential (A.R. 53). Although the Service did not dispute petitioner's factual allegations, the immigration judge denied petitioner's request for relief (A.R. 19-21) because petitioner had not made out a claim of likely persecution on grounds of race, religion, or political opinion.⁴ The Board of Immigration Appeals affirmed the immigration judge's decision (A.R. 2-7). The Board's decision was in turn affirmed by judgment order of the court of appeals (Pet. App. A11).

ARGUMENT

As petitioner concedes (Pet. 17), in order to establish eligibility for relief under Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), aliens must "show a well founded fear that their lives or freedom would be threatened on account of their race, religion, nationality, membership in a particular social group, or political opinion." See 8 U.S.C. 1253(h); *Zamora v. INS*, 534 F. 2d 1055, 1058 (2d Cir. 1976); *Kovac v. INS*, 407 F. 2d 102, 104, 107 (9th Cir. 1969). The alien must also show that the threatened persecution will be at the hands of the government or by an individual or group that the government is

either unwilling or unable to control. *Rosa v. INS*, 440 F. 2d 100, 102 (1st Cir. 1971); *Matter of Pierre*, Interim Decision 2433 (BIA 1975); *Matter of Tan*, 12 I. & N. Dec. 564 (BIA 1967).

The Board correctly found that petitioner's case does not fall within the scope of the statutory provision. Petitioner fears private vengeance for his role in the narcotics investigation, not racial, religious, social, or political persecution. Moreover, petitioner failed to show that the Philippine Government is either unwilling or unable to enforce the law should private individuals seek to harm him.⁵

While petitioner cannot be granted relief under Section 243(h) of the Act, we believe that in the circumstances of this case he should not be deported to the Philippines. We have therefore sought and obtained assurance from INS that, in the absence of some future change in petitioner's circumstances, it will exercise its inherent discretion not to deport petitioner. Petitioner will thus be allowed to remain in the United States in an administrative "deferred action" category⁶ despite his ineligibility for relief under 8 U.S.C. 1253(h).

⁵Petitioner claims (Pet. 18) that the individuals who would seek retribution against him in the Philippines "have the political influence to subvert any attempt by the government to protect" him. However, aside from the evidence that the ringleader of the conspiracy is a former vice-governor of a province in the Philippines, petitioner adduced no evidence in support of his claim.

⁶The administrative "deferred action" category is reserved for cases in which the Service considers deportation inappropriate for humanitarian or other reasons, although the alien is not eligible for statutory relief from deportation. See C. Gordon & H. Rosenfield, *Immigration Law and Procedure* § 5. 13e, at 5-50 to 5-52 (1977). A future change in petitioner's circumstances could result in his case being removed from the "deferred action" category and the reinstatement of deportation proceedings.

⁴Petitioner declined to apply for the privilege of voluntary departure and was therefore ordered deported to the Philippines (A.R. 21).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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